United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-1527

74-1527

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANCIS C. PLANO, APPELLANT

v.

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, APPELLEES.

Appeal from the United States District Court
for the Northern District of New York,
Honorable James T. Foley, Judge Presiding

BRIEF FOR APPELLEES, CLIFFORD W. BAKER, as Supervising Principal of the Westmoreland Central School District, FRANK R. MELIE, as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Members of the Board of Education of the Westmoreland Central School District, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT.

MICHAEL P. DeSANTIS,
Attorney
709-10 First National Bank Building
Utica, New York 13501
(315) 724-2155

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COUNTER-STATEMENT OF FACTS

Appellant Plano, on July 1, 1972, was appointed to a probationary term as a provisionally certified English teacher in the Appellee Westmoreland Central School system. On October 2, 1973, the Appellee District Super-

intendent of Schools Johnson recommended termination of Appellant's probationary (18a) appointment. By notice dated October 3, 1973 (19a), Appellant Plano was notified that a Board meeting would be held on November 2, 1973, and the recommendation of termination of his probationary status would be considered. By letter dated October 9, 1973 (20a), the Appellant Plano requested the reasons for the recommendation of termination. By letter dated October 16, 1973 (21a), the reasons for the recommendation were given to the Appellant Plano.

By letter dated October 24, 1973 (22a), Appellant Plano requested a private executive session with the Board of Education.

Appellant Plano, by letter dated November 1, 1973 (23a), set forth, among other things, his response to the reasons set forth for the request for his termination.

On November 2, 1973, the Appellant Board met and voted to terminate the Appellant effective December 7, 1973 (30a).

Appellant brought the within action and also brought on a motion for temporary restraining order and a preliminary injunction before the United States District Court for the Northern District of New York before Judge James T. Foley, on January 21, 1974.

By Memorandum-Decision and Order, dated February 15, 1974, Judge Foley granted Appellees' motion to dismiss the complaint and denied Appellant's motion for temporary restraining order and preliminary injunction.

ARGUMENT

POINT I: APPELLANT'S COMPLAINT DOES NOT ALLEGE FACTS SUFFICIENT TO CONFER JURISDICTION UNDER 42 U.S.C. §1983 AND 28 U.S.C. §1343, AND ADDITIONALLY DOES NOT STATE A CLAIM UNDER WHICH RELIEF CAN BE GRANTED.

Both 42 U.S.C. §1983, creating a cause of action, and 28 U.S.C. §1343, its jurisdictional counterpart, refer to deprivations committed under color of State Law. It has been recognized that Congress in enacting §1983 meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. United States v. Classic, 313 U.S. 299, Screws v. United States, 325 U.S. 91; Monroe v. Pape, 364 U.S. 167; Williams v. United States, 341 U.S. 97.

Appellant Plano in his complaint seeks money damages against the Appellees in their official capacity and against Appellee Board of Education, a municipal agency. Where one seeks damages against municipal agencies and officials in their official capacities, the suit is in actuality one against the municipality because recovery will be against the public treasury. Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110; Ex parte Young, 209 U.S. 123; Francis v. Davidson, 340 F. Supp. 351.

Action under 42 U.S.C. §1983 and 28 U.S.C. §1343 cannot be maintained in the case at bar since the Civil Rights Act does not apply to suits against municipalities. Eisen v. Eastman, 421 F.2d 560.

A municipality or municipal corporation is not a person under 42 U.S.C. §1983. Monroe v. Pape, 365 U.S. 167, Moor v. County of Alameda, 411 U.S. 693; United States ex rel Gittlemacker v. Philadelphia, 413 F.2d 84; Glass v. Hamilton County, 363 F. Supp. 241.

It is well-settled law that a county or other local governmental entity is not a "person" within that provision of the Federal Statute making every "person" liable who deprives another of his Federal rights under color of State Law. Egan v. Aurora, 365 U.S. 514; Hewitt v. Jacksonville, 188 F.2d 423; Harkless v. Sweeny Independent School District, 427 F.2d 319.

Appellant's complaint with respect to his allegation of deprivation of his right to free speech is wholly conclusory and alleges no facts upon which a court could find that the termination of his probationary status with Appellee Board was based solely on his exercise of his right to free speech. In this respect, the complaint fails to state a claim on which relief can be granted and must therefore be dismissed as insufficient in law.

Appellant has failed to give notice as required under Sections 50-e and 50-i of the General Municipal Law and §3813 of the Education Law, which is required in any claim for damages.

POINT II: APPELLANT'S STANDING TO SUE LIES IN THE PROCEDURES GOVERNED BY THE STATUTES AND LAWS APPLICABLE THERETO FOLLOWED IN TERMINATING HIS PROBATIONARY STATUS WITH APPELLEE BOARD.

Sections 3013, 3019a and 3031 of the Education Law of the State of New York govern the appointment and termination of services of a probationary, non-tenured teacher. (See Appendix for Statutes.)

These statutes were followed in all respects by the Appellees. It is significant to note that nowhere in the complaint of Appellant is any attack made on these statutes, either as to the compliance with them by Appellees or as to their constitutionality. Since these statutes are organic

and basic and go to the heart of the case and are the statutes which govern the appointment and termination of probationary teachers who have full knowledge of same, it is especially noteworthy that nowhere in any of the pleadings or other papers of the Appellant is there any attack or inference as to their constitutionality.

POINT III: THE ADMINISTRATIVE REMEDIES AVAILABLE TO APPELLANT ARE PROBABLY THE MOST COMPREHENSIVE, SUBSTANTIAL AND PERCEPTIVE REMEDIES AVAIALABLE TO ANY CITIZEN. APPELLANT NOT ONLY DID NOT AVAIL HIMSELF OF THEM BUT IN FACT FLOUTED AND PURPOSEFULLY REFUSED TO PURSUE SAME. HE WAS REQUIRED TO EXHAUST THESE REMEDIES IN THE CASE AT BAR.

It is only reasonable to conclude that the Board's decision should not be subject to attack in the courts at least before its invalidity had been adjudicated by recourse to the protest or appeal procedure prescribed by statute.

The New York Legislature in enacting §3031 of the Education Law and §310 of the Education Law and in its promulgation of the Rules and Regulations of the Commissioner of Education, among other things, was familiar with the consistent history of delay and exigencies originating in litigation before the courts, both State and Federal, to say nothing of the costly and lengthy process of appeals in both State and Federal courts and, cognizant of these difficulties, established a single and simple procedure for review of any decision affecting any teacher to the Commissioner of Education, whose specialized knowledge in the field of education and experience gained in the administration of educational problems and their complexities, and affording to the Commissioner the opportunity to either affirm, reverse or modify

any actions taken subject to his review before resort to judicial determination of their validity. Yakus v. United States, 321 U.S. 414.

The organization of such procedure, both exclusive and extensive, especially adopted to the field of education and all its complexities is well within the constitutional power of the Legislature and, in addition to affording concerned parties the expert administrative knowledge and experience, would also minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. These procedures are especially and further appropriate since they afford to any aggrieved teacher more than reasonable opportunities to be heard and to present any evidence he desires, all in keeping with due process of law. Bradley v. Richmond, 277 U.S. 477; First National Bank v. Weld County, 264 U.S. 450; Anniston Mfg. Co. v. Davis, 301 U.S. 337.

Appellant contends that the procedures available to him under §3031 of the Education Law and §310 of the Education Law are inadequate to ensure due process and, further, that the Commissioner of Education is not cognizant of the constitutional rights of teachers. A sufficient answer to all these contentions is that the Appellant Plano has failed to seek the administrative remedy and the statutory review which were open to him, and he has not shown that had he done so any of the consequences which he apprehends would have ensued to any extent whatever or, if they should, that the statute withholds judicial remedies adequate to protect his rights.

Here, there is no occasion to pass upon a determination of the Commissioner of Education said to violate due process, free speech or any

other constitutional right, or any right due Appellant under the complexities of the educational or teaching process or the Education Law, none of which have ever been brought up to the Commissioner of Education for review, and obviously the Court cannot pass upon action which might have been taken on a protest or appeal by Appellant who has never made a protest or appeal or in any way sought the remedy that the Legislature provided.

In the absence of any proceeding before the Commissioner of Education, it cannot be assumed that the Commissioner of Education would fail in the performance of any duty imposed upon him, not only by the Education Law but by the Constitution and laws of the United States or that he would deny due process to Appellant. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531.

Only if we could say in advance of resort to the statutory procedure of appeal to the Commissioner of Education under §310 of the Education Law that it is incapable of affording due process to Appellant could it be concluded that Appellant has shown legal excuse for his failure to resort to it or that his constitutional rights have been or will be infringed. Natural Gas Co. v. Slattery, 302 U.S. 300. But upon a full examination of the provisions of the statutes applicable in the case at bar, §3013, §3019a, §3031 and §310 of the Education Law, it is evident that the authorized procedure is not incapable of affording the protection to Appellant's rights required by due process.

In addition, the Commissioner of Education is bound by the laws of the State of New York and the Constitution of the United States. Any party feeling aggrieved by a decision of the Commissioner of Education may have

said decision reviewed by the courts of the State of New York under Article 78 of the Civil Practice Law and Rules.

It is irrelevant for Appellant to suggest that the Commissioner of Education is an improper or inadequate forum. Action taken by the Commissioner is reviewable by the courts. Further, by the past record of the Commissioner of Education and the plethora of decisions founting from his office, many of those decisions overruling and reversing decisions of Boards of Education and school administrators, it becomes apparent that the Commissioner of Education has not failed in the performance of the duties imposed upon him by the laws of the State and the Constitution.

The courts of the State of New York are zealous in the protection of the constitutional rights of teachers. In Matter of Board of Education, Town of Conklin, 42 A.D. 2d 473, the Court held that a Board of Education could not circumvent constitutional rights of teachers, saying:

> "...Unfettered as this power of a Board of Education may appear, it is however, circumscribed by the equal protection clause of our State Constitution (NY Const. Article I, sec. 11) and subject to the provisions of the Human Rights Law (Executive Law, Art. 15, sections 290-301)."

Other court decisions have upheld constitutional rights (Matter of Board of Higher Education of City of N.Y. v. Carter, 14 N.Y. 2d 138; Matter of Board of Education of Syracuse City School District v. State Division of Human Rights, 38 A.D. 2d 245).

Further evidence of the absence of the absoluteness of the power of a Board of Education to dismiss a probationary teacher and to protect the constitutional rights of probationary teachers is demonstrated in the realm

of the Public Employment Relations Board which, it has been held, has the authority to act upon an "improper practice" charge filed against a Board of Education where it was alleged that the Board had dismissed five probationary teachers because of their activities on behalf of a Teachers Association (Board of Education Central School District #1, Town of Grand Island v. Helsby, 37 A.D. 2d 493, aff'd. 32 N.Y. 2d 660). These cases show more than an abstract realism as to the cognizance and awareness of the New York courts in the protection of the constitutional rights of its citizens.

Additionally, those who take it upon themselves to determine what is and is not adequate, or what is or is not right, point up a procedural principle most familiar to the Supreme Court of the United States, in that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U.S. 323; Barbour v. Georgia, 249 U.S. 454; Whitney v. California, 274 U.S. 357.

The facts and issues of this case, and those cited herein, amply pinnacle the issue of exhaustion of administrative remedies as they apply to the case at bar.

The Commissioner of Education is a specialist in the field of education and certainly more so than teachers or the courts qualified to pass upon the issues raised by the Appellant.

The absence of any indication in the record before this Court that state appellate procedure was followed and proved inadequate constitute a bar to the consideration of this Court to Appellant's attack upon the inadequacy

of the state remedies. Christian v. New York State Department of Labor, 42 L.W. 4181, January 21, 1974.

The case at bar is no ex parte situation. The Commissioner of Education's review affords to both parties ample opportunity to prepare as extensive or limited a record as they wish. There is no bar to preparing as extensive a record as any party desires.

There are sound reasons for declining review in the case at bar, where the Appellant has taken it upon himself to not afford the State Commissioner of Education the opportunity to apply his vast expertise, experience and knowledge in the field of education to a determination that is clearly within his subject matter jurisdiction.

The protection and safeguards afforded by state law and administrative remedies available to Appellant, §310 of the Education Law and Article 78 of the Civil Practice Law and Rules, are legally, constitutionally and equitably not only adequate but substantial in nature and afford any aggrieved person appropriate avenues and processes before state established bodies with a strong and common interest, along with specialized expertise in the field of education, in having the question or problem decided and resolved fairly and impartially, affording due process to all, allowing the making of as complete a record as the parties desire, and submitting all facts and issues to a statutorily designated expert in the field.

A similar situation presented itself in a Selective Service case involving a conscientious objector: McGee v. United States, 402 U.S. 479, in which the Court stated:

> "...But here it is apparent that McGee's failure to exhaust did jeopardize the interest in full administrative fact gathering and utilization of agency expertise rather than the contrary. Unlike the dispute about statutory interpretation involved in McKart, McGee's claims to exempt status - as a ministerial student or a conscientious objector - depended on the application of expertise by administrative bodies in resolving underlying issues of fact. ...The Selective Service System and the courts may have a 'stronger interest' in having the question decided in the first instance by the local board and then by the appeal board which considers the question anew. ...This 'stronger interest' in the circumstances of the present case, has become compelling and fully sufficient to justify invocation of the exhaustion doctrine."

In analyzing the McGee case to the case at bar, consider the following:

Section 3031 of the Education Law affords a probationary teacher the opportunity to request reasons for his dismissal and goes further to allow the teacher to present in writing a reply to these reasons. He may reply in any way he wishes. He may present a full and complete statement of facts and law supporting his side of the issue.

If this is not sufficient, and he is aggrieved by the decision of the Board of Education, he may then appeal to the Commissioner of Education under §310 of the Education Law.

This then affords him the protection of the Regulations of the Commissioner of Education, whereby he may then prepare in writing as complete a record, both factually and legally, as he desires.

(See Appendix for Commissioner's Regulations on Appeals.)

If he is aggrieved by the Commissioner's decision, he may then, under Article 78 of the Civil Practice Law and Rules, appeal to the courts

of the State of New York on a record that he himself created and perfected.

It is inconceivable that a more adequate and substantial administrative remedy could be created by man.

In Hayes v. Cape Henlopen School District, 341 F. Supp. 823, the Court, in referring to the adequacy of state remedies, stated:

> "...to be adequate, the procedures must be sufficiently delineated either through statute, regulation or practice to permit the individual and his attorney to accurately assess their responsibilities and opportunities within the administrative process and the probable efficacy of that process."

Sound legal logic parallels the exhaustion doctrine. The Commissioner of Education is created as a separate entity and is invested with certain duties and powers. These powers and duties are in keeping with due process, a completely impartial, factual and legalistic procedure set forth to enable the Commissioner of Education to see any grievance put before him to completion. The exhaustion doctrine is an expression of executive and administrative autonomy. The courts ordinarily should not interfere with an administrative agency until it has completed its action. This reasoning is particularly pertinent where the function of the agency requires application of special expertise.

Judicial review, in fact, may be hindered by the failure of the litigant to allow the agency to make a factual record, exercise its discretion or apply its expertise.

A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative

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Judicial review, in fact, may be hindered by the failure of the litigant to allow the agency to make a factual record, exercise its discretion or apply its expertise.

A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative

remedies, the courts may never have to intervene, and notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.

It is also a consideration that frequent and deliberate flouting of administrative processes could weaken the effectiveness of the agency by encouraging people to ignore its procedures.

This Court, has, as recently as 1972, held, in James v. Board of Education, 461 F. 2d 566, that a plaintiff with a claim for relief under the Civil Rights Act is required to exhaust state administrative remedies. In this case, the Second Circuit Court of Appeals reviewed a matter that had been appealed to the Commissioner of Education wherein the Commissioner of Education stated in his decision:

> "...While I fully agree that a Board of Education has broad powers over a probationary teacher and may dismiss a probationary teacher without giving a reason, the exercise of the powers by a board must be made within the ambit of the purpose for which they were granted and in a manner consistent with our constitutional framework...."

See also Puentes v. Board of Education, 24 N.Y. 2d 996. These and other cases cited indicate a mandate upon the Commissioner of Education for the constitutional rights of teachers and the fact that the courts may review his decisions concerning these rights.

There is nothing wooden about the rights of appeal to the Commissioner of Education under §310 of the Education Law. He is expert in his field, and he is bound by the Constitution of the United States and the laws of the State of New York. Here, the State of New York has provided a completely adequate and all encompassing state administrative remedy that

Appellant, for his own protection and speedy relief, was compelled to take. Eisen v. Eastman, 421 F. 2d 560.

POINT IV: APPELLANT HAS NO PROPERTY INTEREST IN HIS STATUS AS A PROBATIONARY TEACHER AND HAS NOT BEEN DEPRIVED OF ANYTHING WITHOUT DUE PROCESS OF LAW.

Appellant was given a statement of reasons for the request for his termination. These reasons were as follows:

"1. You have been demanding of and uncooperative with the school administration.

"2. You have shown poor judgment in your choice of subjects for assignment and classroom discussion.

"3. Efforts on the part of the school administrators to correct your deficiencies through discussion with you have been unsuccessful."

Nowhere in these reasons was any charge made against him that might seriously damage his standing and associations in the community. His good name, honor, integrity or reputation were not in any way placed in issue.

The Appellees did not invoke any rule or regulation to bar him from other public employment in teaching.

Appellant is still a provisionally certified teacher and eligible for employment anywhere.

Property interests are not created by the Constitution. Rather, they are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claim of entitlement to those benefits.

But the important fact in this case is that the state statute defining the rights of Appellant specifically provides that his status is probationary only and that he is governed by the appropriate sections of the Education Law.

Thus, the terms of Appellant's appointment secured absolutely no interest in re-employment for the next year, or, in fact, any period. The state statutes support no claim of entitlement to re-employment, nor, significantly, was there any state statute or School Board rule or policy that secured Appellant's interest in re-employment or created any legitimate claim to it. The Appellant may by his own thinking surely have an abstract concern in being rehired, but he did not have a property interest sufficient to require the School Board to give him a hearing when they decided to terminate his probationary status with this School District. Board of Regents v. Roth, 408 U.S. 564.

POINTS V AND VI: APPELLEES HAVE ACTED WITHIN THE CONFINES OF THE STATUTES MADE AND PROVIDED, ALL OF WHICH AFFORD DUE PROCESS WITH MORE THAN AMPLE SAFEGUARDS IN ADDITION TO OPPORTUNITIES AND, IN FACT, RIGHTS TO APPELLANT TO PERFECT AS COMPLETE A RECORD AS HE DESIRES.

The statutes involved, §3013, §3019a, §3031 and §310 of the Education Law and the Commissioner's Rules and Regulations, are replete with safeguards and protections sufficient and substantially adequate to protect the rights of probationary teachers at all stages of the proceedings.

Section 3031 mandates the giving of reasons for termination. It also affords the Appellant the right to respond in writing in any manner he

desires. At this point, he can prepare as complete a record as he wishes, with affidavits, documents, statements, exhibits or anything else bearing on the issues that would attack the reasons for termination and bolster his case.

Additionally, if further aggrieved, an appeal to the Commissioner of Education also includes the continuing right to submit, besides the petition on appeal, any new or additional evidentiary material, affidavits and exhibits desired. Oral argument can also be requested.

POINT VII: APPELLEES HAVE NOT IN ANY MANNER ABRIDGED APPELLANT'S FIRST AMENDMENT GUARANTEE OF FREE SPEECH.

Appellant, a probationary teacher, was just that, on probation. Newly out of college, all teachers are held to a period of proving themselves to attain tenure. This has been the procedure, and all know it and live by it.

Appellant's employment was terminated for the reasons given him by the Supervising Principal and because his response to the Board was apparently insufficient to rebut, explain or counter these reasons. There is no showing here of the confinement of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

There is no allegation that the Appellees adopted a regulation or rule forbidding discussion or expression of opinion on the subject of premarital sex, either in or out of the classroom. Tinker v. Des Moines, 393 U.S. 503.

Justice Black, in a concurring opinion, in Epperson v. Arkansas, 393 U.S. 97, which case involved an absolute Fourteenth Amendment violation of the establishment of religion prohibition where the state stutute made it a crime to teach the theory of evolution, stated: "...I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decisions of this particular case requires..."

Justice Black went further and stated:

> "...There is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what these motives were. See, e.g., United States v. O'Brien, 391 U.S. 367."

Justice Black further stated, at p. 113:

> "...I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political or religious subjects that the school's managers do not want discussed. This court has said that the rights of free speech 'while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.'"

POINT VIII: THE DENIAL OF A RIGHT TO A RESTRAINING ORDER OR INTERLOCUTORY INJUNCTION TO ONE WHO HAS FAILED TO APPLY FOR AVAILABLE ADMINISTRATIVE RELIEF, NOT SHOWN TO BE INADEQUATE, IS NOT A DENIAL OF DUE PROCESS.

Natural Gas Co. v. Slattery, 302 U.S. 300.

It cannot be assumed that had Appellant appealed to the Commissioner of Education, which he could have done immediately after November 2, 1973,

he would not have secured even sooner the same relief he requested by his motion for restraining order and injunction returnable on January 21, 1974. Yakus v. United States, 321 U.S. 414, p. 439.

The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to a plaintiff. Even in suits in which only private interests are involved, the award is a matter of sound judicial discretion in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd. v. John Wanamaker, 253 U.S. 136; Rice & Adams Corp. v. Lathrop, 278 U.S. 509.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Memorandum-Decision and Order of the District Court be affirmed.

Respectfully submitted,

MICHAEL P. DeSANTIS,
Attorney for Appellees
Office and Post Office Address:
709-10 First National Bank Building
Utica, New York 13501
(315) 724-2155

Dated: July 1, 1974

APPENDIX FOR STATUTES

UNITED STATES

Constitution

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code

Title 28

§1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Title 42

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NEW YORK

Education Law

§310. Appeals or petitions to commissioner of education and other proceedings.

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§311. Powers of commissioner upon appeals or petitions, et cetera.

The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§3013. Tenure: certain other school districts.

1. (a) Teachers and all other members of the teaching staff, of school districts employing eight or more teachers, other than city school districts and school districts having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of five years. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

* * *

2. On or before the expiration of the probationary term of a person appointed for such term, the district superintendent of schools shall make a written report to the board of education or trustees recommending for the district, those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty; (c) Failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provisions of this section no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§3019-a. Notice of termination of service by teachers.

A teacher who desires to terminate his services to a school district at any time, shall file a written notice thereof with the school authorities of such school district or with the board of cooperative educational services or county vocational education and extension board at least thirty days prior to the date of such termination of services. School authorities or such boards which desire to terminate the services of a teacher during the probationary period shall give a written notice thereof to such teacher at least thirty days prior to the effective date of such termination of services.

§3031. Procedure when tenure not to be granted at conclusion of probationary period of when services to be discontinued.

Notwithstanding any other provision of this chapter and except in cities having a population of one million or more, boards of education and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons of such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

This section shall not be construed as modifying existing law with respect to the rights of probationary teachers or the powers and duties of boards of education or boards of cooperative educational services, with respect to the discontinuance of services of teachers or appointments on tenure of teachers.

§3813. Presentation of claims against the governing body of any school district.

1. No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or claim against the

district, or involving its rights or interests shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services or any officer of a school district, board of education, or board of cooperative educational services, unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

2. Notwithstanding anything to the contrary hereinbefore contained in this section, no action or special proceeding founded upon tort shall be prosecuted or maintained against any of the parties named in this section or against any teacher or member of the supervisory or administrative staff or employee where the alleged tort was committed by such teacher or member or employee acting in the discharge of his duties within the scope of his employment and/or under the direction of the board of education, trustee or trustees, unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law. Every such action shall be commenced pursuant to the provisions of section fifty-i of the general municipal law.

3. The provisions of this section shall not supersede, alter or affect the provisions of section twenty-five hundred twelve of this chapter.

Code of Rules and Regulations of the Department of Education (Statutory Authority §311 Education Law)

Section 275.1 - Parties. The party commencing an appeal shall be known as petitioner or appellant and any adverse party, as respondent. After an appeal is commenced in accordance with these rules, no party shall be joined or be permitted to intervene, except by leave or direction of the Commissioner of Education.

Section 275.2 - Class appeals. (a) When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

(b) Protective orders. The commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.

Section 275.3 - Types of pleadings. There shall be a petition, an answer, and, if new matter is alleged in the answer, a reply thereto. The commissioner may permit or require additional pleadings upon such terms and conditions as he may specify. The form of all pleadings shall be so construed as to do substantial justice. All pleadings must be typewritten, addressed "To the Commissioner of Education", must contain the allegations of the parties in numbered paragraphs and must be filed in accordance with section 275.9 of this Part.

Section 275.4 - Names of parties or attorneys to be endorsed on all papers. All pleadings and papers submitted to the commissioner in connection with an appeal must be endorsed with the name, post office address and telephone number of the party submitting the same, or, if a party is represented by counsel, with the name, post office address and telephone number of his attorney.

Section 275.5 - Verification. All pleadings shall be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or board of education of a school district, it must be signed by one of such trustees or a member of such board who is familiar with the facts underlying the appeal, pursuant to a resolution of such board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting the same. If, however, the appeal is brought from the action of the trustee or the board of trustees or board of education of a school district, verification of the answer shall be made by one of such trustees or a member of such board who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them who is familiar with the facts. A reply shall be verified in the manner set forth for the verification of an answer.

Section 275.7 - Oaths. All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit.

Section 275.8 - Service of pleadings and supporting documents. (a) Petition. A copy of the petition and of all papers annexed thereto shall be personally served upon each named respondent, or, if he cannot be found upon diligent search, by delivering and leaving the same at his residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening. If a school district is named as a party respondent, service upon such school district shall be made per-

sonally by delivering a copy of the petition to the district clerk or to any trustee or any member of the board of education of such school district. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

(b) Subsequent pleadings and papers. All subsequent pleadings and papers shall be served upon the adverse party, or if the adverse party is represented by counsel, upon his attorney. When the same attorney appears for two or more parties, only one copy need be served upon him. Service of all pleadings subsequent to the petition shall be made by registered mail, return receipt requested, or by personal service.

(c) Award of bid. If an appeal involves the award of a contract pursuant to article 5-A of the General Municipal Law or pursuant to subdivision 14 of section 305 of the Education Law and a party other than the appellant has been designated as the successful bidder or has been awarded a contract, such successful bidder must be joined as a respondent and must be served with a copy of the petition. In such case, the respondent board of education or board of trustees shall forward to the commissioner within 20 days after service of the petition on appeal, a copy of the notice to bidders together with proof of publication thereof, a copy of the specifications and copies of all bids or proposals.

(d) Disputed elections. If an appeal involves the validity of a school district meeting or election or the eligibility of a district officer, a copy of the petition must be served upon the trustee or board of trustees or board of education as the case may be, and upon each person whose right to hold office is disputed and such person must be joined as a respondent. In such case, except where the eligibility of a district officer is involved, any qualified voter may serve and file an answer in such appeal, whether or not the trustee or board of trustees or board of education serves and files an answer therein.

Section 275.9 - Filing. Within five days after the service of any pleading or paper, the original, together with the affidavit of verification, an affidavit proving the service of a copy thereof and the registry receipt where service by registered mail has been effected shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York, 12224. The affidavit of service shall be in the form set forth below and shall indicate the name and official character of the person upon whom service was made.

Section 275.10 - Contents of petition. The petition shall contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled. Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act or acts complained of.

Section 275.11 - Notice with petition. Each petition must contain the following notice:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the rules relating to appeals before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.

Section 275.12 - Contents of answer. The answer of each respondent shall contain a clear and concise statement of his defenses to each claim and shall either admit or deny the allegations of the petition. In addition, each respondent may set forth affirmative defenses or defenses by way of avoidance. If more than one respondent has been named and served and if common questions of law or fact are involved, the respondents, if otherwise united in interest, may submit a joint answer to the petition.

Section 275.13 - Service of answer. Each respondent upon whom a copy of the petition has been served must, within 20 days from the time of such service, answer the same, either by concurring in a statement of facts with the petitioner or by service of an answer, together with any necessary supporting documentation. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20 day period. If the last day for service of an answer falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

Section 275.14 - Reply. The petitioner shall reply to each affirmative defense contained in an answer. The reply shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8 (b). If the answer has been served by mail upon petitioner or his counsel, the date of mailing and the two days subsequent thereto shall be excluded in computing the 10 day period. If the last day for service of

reply falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

Section 275.15 - Representation by attorney. A party other than a school district or a corporation may prosecute or defend an appeal before the commissioner in person or by an attorney. A school district or a corporate party may appeal only by an attorney.

Section 275.16 - Limitation of time for initiation of appeal. An appeal to the commissioner must be instituted within 30 days from the making of the decision or the performance of the act complained of. The commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

Section 275.17 - Amicus curiae. The commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law amicus curiae in connection with a pending appeal. Those permitted to submit memoranda amicus curiae shall not be considered parties to the appeal before the commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Section 276.1 - Stay of proceedings. The initiation of an appeal shall not, in and of itself, effect a stay of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the facts and the law upon which such stay should be granted. The commissioner may, in his discretion, with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

Section 276.2 - Oral argument. (a) If a petitioner desires an opportunity for oral argument before the commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent, or if there be more than one, a respondent may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument but respondent has made a timely request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.

(c) Argument on appeals to the commissioner may be heard before the commissioner, the acting commissioner or the counsel.

(d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(e) Adjournment of the date of oral argument. Once an appeal has been scheduled for oral argument on a particular date by the office of counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request.

(f) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the commissioner extends such time.

Section 276.3 - Extensions of time to answer or reply. No extension of time to answer the petition or to reply to an answer will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer a pleading may not be extended solely by stipulation of the parties or their counsel.

Section 276.4 - Briefs. Memoranda of law may be submitted by any party to an appeal or by an amicus curiae, and may be requested by the commissioner or by his counsel.

Section 276.5 - Records and reports. The commissioner may, in his discretion, in the determination of an appeal, take into consideration any official records or reports on file in the Education Department which relate to the issues involved in such an appeal.

Section 276.6 - Decisions to be filed. A copy of the decision of the commissioner in an appeal will be forwarded by the office of counsel to all parties to the appeal, or, if they be represented by counsel, to counsel for the respective parties, with instructions for service and filing as may be appropriate. A copy will also be sent to those persons or organizations who have been granted leave to submit memoranda amicus curiae.

Section 276.7 - Reopening of a prior decision. Any party to an appeal may, within 30 days after the date of a decision thereon, appeal to the commissioner for a reopening of said decision and for a reconsideration thereof. Service of the application shall be made in the manner set forth for service of an answer. Motions for reopening of a prior decision are addressed solely to the discretion of the commissioner and will not be granted in the absence of a showing that the decision appealed from was rendered under a misapprehension as to the facts or that there is new and material evidence which was not available at the time the original decision

was made. Affidavits in opposition to an application for reopening may be submitted by any parties opposing the same. No oral argument shall be had in connection with an application for reopening. If the commissioner finds that there is no adequate basis for a reopening, he will render a decision to the effect.

Section 276.8 - Reargument. (a) If the commissioner, in his discretion, is satisfied that justice will be served by reconsideration of the decision, he will give notice of his decision to all of the parties to the initial decision. The provisions relating to practice and pleadings shall be applicable, and, for the purpose of reargument, the application for reopening shall be treated as the petition. In such case, the commissioner may define and limit the issues to be considered and may restrict the time for service of pleadings.

(b) The commissioner may, on his own motion, reopen a prior decision in the absence of an application therefor where in his judgment the interests of justice will be served thereby.

Section 276.9 - Dismissal of appeal. The commissioner may, in his discretion, and at any stage of the proceedings, dismiss an appeal if it appears to his satisfaction that the petition does not set forth a clear and concise statement of the petitioner's claim or that the appeal has become academic.

General Municipal Law

§50-e. Notice of claim.

1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.

2. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

3. The notice shall be served on the party against whom the claim is made by delivering a copy thereof, in duplicate, personally, or by registered mail, to the person, officer, agent, clerk or employee, designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered; provided that if service of such notice

be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim.

4. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court, or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made, in the manner specified in subdivision three.

6. Any time after the date of service of the notice of claim and at or before the trial of an action or the hearing upon a special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of

service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court provided it shall appear that the other party was not prejudiced thereby. Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.

7. This section shall not apply to claims arising under the provisions of the workmen's compensation law or, the volunteer firemen's benefit law or to claims of infant wards of public corporations where the claim is against such public corporation by its own infant ward.

§50-i. Presentation of tort claims: commencement of actions.

1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

3. Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

Civil Practice Law and Rules

Article 78

§7801. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§7802. Parties.

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.

(b) Persons whose terms of office have expired; successors. Whenever necessary to accomplish substantial justice, a proceeding under this article may be maintained against an officer exercising judicial or quasi-judicial functions, or member of a body whose term of office has expired. A notice of the proceeding shall be served upon the attorney-general, and any party may join the successor of such officer or member of a body or other person having custody of the record of proceedings under review.

(c) Prohibition in favor of another. Where the proceeding is brought to restrain a body or officer from proceeding without or in excess of jurisdiction in favor of another, the latter shall be joined as a party.

(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene.

§7803. Questions raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.